UNION INSURANCE MALAYSIA SDN BHD

v.

CHAN YOU YOUNG

COURT OF APPEAL, KUALA LUMPUR
NH CHAN JCA
ABDUL MALEK AHMAD JCA
DENIS ONG JCA
[CIVIL APPEAL NO: J-04-28 OF 1996]
17 MARCH 1999

INSURANCE: *Motor insurance - Passenger liability - Exclusion - Person carried by reason of or in pursuance of contract of employment - Road Transport Act 1987, ss. 91(1), 96(1)*

ROAD TRAFFIC: *Insurance - Liability of insurers - Liability to satisfy judgment obtained by passenger against insured - Passenger carried by reason of or in pursuance of contract of employment - Passenger was wife of insured - Road Transport Act 1987, ss. 91(1), 96(1)*

The respondent ('the plaintiff') was a passenger in a car belonging to her husband, the holder of a motor insurance policy with the appellant ('the company'). The plaintiff was being driven by her son, an authorised driver under the policy, to her place of work when an accident occurred on 4 June 1988.

The plaintiff sued her husband and son and obtained judgment. The plaintiff then sought to enforce the judgment against the company, relying on the Road Transport Act 1987 ('the Act'), para. (bb) of the proviso to s. 91 read with s. 96(1).

The policy of insurance excluded loss to third parties where the loss occurred in the course of the third party's employment with the insured, or where the third party was a member of the insured's household, except if that third party was carried by reason of or in pursuance of a contract of employment. It was argued for the company that it should be implied that the plaintiff had to be in the employ of the insured in order to fall within the latter exception to the exception, and since she was not, her loss was excluded. The sessions court judge found for the plaintiff and the company appealed to the High Court. The High Court dismissed the appeal and the company further appealed.

The main issues before the court were: (i) whether the company was liable to satisfy the judgment; and (ii) whether the judgment obtained by the plaintiff against her husband for a tort purportedly committed by him was invalid by virtue of s. 9(2) of the Married Women Act 1957 ('the MWA').

Held:

Per Abdul Malek Ahmad JCA

[1] Where the words in their ordinary meaning gave rise to two distinct interpretations resulting in ambiguity, the *contra proferentum* rule would apply and any ambiguity should be construed in favour of the insured.

[2] There was no doubt that the plaintiff was a member of the insured's household and was in the car 'by reason of or in pursuance of' her contract of employment with her employer. If the company intended to exclude that situation, it had to do so expressly. As such, the plaintiff did not have to be employed by the insured in order to fall within the exception to the exception, and she was therefore entitled to have the judgment satisfied by the company.

[3] Section 9(2) of the MWA only prevents actions in tort against a spouse. As the plaintiff had sued the husband not in tort but vicariously for the action in tort against her son, the judgment was valid and enforceable.

[Appeal dismissed.]

Case(s) referred to:

Baker v. Provident Accident & White Cross Insurance Co Ltd [1939] 2 All ER Annotated 690 ***(dist)***
Central Lorry Service Co Sdn Bhd v. The American Insurance Co [1981] 2 MLJ 40 ***(refd)***
Chan Kum Fook & Ors v. The Welfare Insurance Co Ltd [1975] 2 MLJ 184 ***(refd)***
China Insurance Co Ltd v. Teh Lain Lee & Anor [1977] 2 MLJ 1 ***(foll)***
Cornish v. Accident Insurance Co Ltd [1889] 23 QBD 453 ***(foll)***
English v. Western [1940] 2 KB 156 ***(refd)***
Izzard v. Universal Insurance Co Ltd [1937] AC 773 ***(foll)***
Lim Eng Yew v. United Oriental Assurance Sdn Bhd [1989] 1 MLJ 454 ***(foll)***
Malaysian National Insurance Sdn Bhd v. Abdul Aziz Mohamad Daud [1979] 2 MLJ 29 ***(refd)***
Nottingham v. Aldridge & Anor [1971] 2 All ER 751 ***(refd)***
Richards v. Cox [1943] 1 KB 139 ***(foll)***
Smith v. Moss & Anor [1940] 1 All ER Annotated 469 ***(refd)***
Tan Keng Hong v. Fatimah Abdullah & Ors [1974] 1 MLJ 156 ***(foll)***
Tan Keng Hong & Anor v. New India Insurance Co Ltd [1978] 1 MLJ 97 ***(dist)***
United Oriental Assurance Sdn Bhd v. Lim Eng Yew [1991] 3 CLJ 2418 ***(foll)***
Vandyke v. Fender & Another Sun Insurance Office Ltd [1970] 2 QB 292 ***(dist)***
Watson v. Phipps [1986] 60 ALJR 1 ***(refd)***

Legislation referred to:

Married Women Act 1957, ss. 2(1), 9(2)
Road Traffic Ordinance 1958, ss. 75(1), 80(1)
Road Transport Act 1987, ss. 91(1)(bb), 96(1)
Road Traffic Act 1930 [UK], s. 36(1)(b)(ii)

For the appellant - Gurdial Singh Nijar (RA Kumar with him); M/s Nijar, Kumar Netto & Partners
For the respondent - Clarence Edwin; M/s Abdul Raman Saad & Assoc
Watching brief for Persatuan Insurans Malaysia - T Sagadevan; M/s Shearn & Delamore

[Appeal from High Court, Johor Bahru; Civil Appeal No: 12-26 of 1994]

Reported by Anne Khoo

JUDGMENT

Abdul Malek Ahmad JCA:

The poser in this appeal is whether a woman, who is the respondent before us, travelling as a passenger in a motor car belonging to her husband, who is the insured in the relevant policy covering the said motor car which is being driven by her son, who is the authorised driver under that policy, can claim damages from the insurance company, the appellant here, in Johor Bahru Sessions Court Civil Action 52-804-91(3) (hereinafter "the second suit") for a road accident that occurred on the morning of 4 June 1988 while being driven to work at a market stall at the Central Market, Jalan Ah Fook, Johor Bahru run by Tharmarajoo a/l Chinna Kolanthai (hereinafter "Tharmarajoo") after judgment had been entered against her husband and son in Johor Bahru Sessions Court Civil Action 53-218-1989(1) (hereinafter "the first suit") on 21 November 1991.

In the first suit, interlocutory judgment had been entered against the husband and son on 14 March 1991 and the final judgment in default was entered on 21 November 1991 for general damages in the sum of RM47,000, loss of pretrial earnings amounting to RM12,000, RM8,400 for pretrial costs of hiring a maid and another RM4,800 for post trial costs of hiring a maid, and interest at 8 per cent per annum on general damages from the date of service of the writ of summons on 8 January 1990 to the date of judgment, and at 4 per cent per annum on pretrial special damages of RM21,000 from the date of accident on 4 June 1988 to the date of judgment, and another 8 per cent per annum on the judgment sum thereafter to the date of realisation with costs assessed at RM6,873.

Subsection (1) of s. 91 of the Road Transport Act 1987 (hereinafter "the Act') states:

> 91(1) In order to comply with the requirements of this Part, a policy of insurance must be a policy which –
>
> (a) is issued by a person who is an authorised insurer within the meaning of this Part; and

(b) insures such person, or class of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the motor vehicle or land implement drawn thereby on a road:

Provided that such policy shall not be required to cover

(aa) liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment; and

(bb) except in the case of a motor vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting onto or alighting from the motor vehicle at the time of the occurrence of the event out of which the claims arise; or

(cc) any contractual liability.

The second suit was filed on 1 December 1991 based on para. (bb) of the proviso to sub-s. (1) of s. 91 of the Act read with s. 96, in particular sub-s. (1), of the Act which states:

96. Duty of insurers to satisfy judgments against persons insured in respect of third party risks.

(1) If, after a certificate of insurance has been delivered under subsection (4) of section 91 to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of subsection (1) of section 91 (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, the insurer shall, subject to this section, pay to the persons entitled to the benefit of the judgement any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgements.

To put everything in its proper perspective, the agreed statement of facts in the second suit were:

1. That the policy holder of policy No. DVPM88023061H is one Chan Siak Heng.

2. That Chan You Young, the Plaintiff in C/A No. 53-218/89-1 is the wife of the said policy holder.

3. That Chan Tak Boon @ Ching Tak Boon, the 2nd Defendant in C/A No. 53-218/89-1 is the son of the policy holder.

4. That all three of them are members of the policy holder's household.

5. That the accident happened on the 4.6.88.

6. At the time of the accident Chan Tak Boon @ Ching Tak Boon was driving car No. BAQ 2533 and Chan You Young was seated as a passenger on the front seat beside the driver's.

7. Chan Tak Boon @ Ching Tak Boon was driving with the authority and consent of the policy holder. In other words, Chan Tak Boon @ Ching Tak Boon was an authorised driver at the material time of the accident.

8. At the material time of the accident, Chan You Young was being driven by her son to her working place, a market stall at the Central Market Jalan Ah Fook Johor Bahru run by one Tharmarajoo a/l Chinna Kolanthai.

9. Chan You Young was paid a salary of RM450.00 p.m. by the said Tharmarajoo a/l Chinna Kolanthai.

Consequently, the issues to be tried were:

1. Whether the Defendants are liable to pay the Judgment dated 21.11.91 under the said Policy of the Insurance and in particular under Section II Clause 1(a) thereof.

2. Whether the judgment in C/A No. 53-218/89-1 the enforcement of which is done through the action herein, is invalid on the ground that the Plaintiff in the said C/A No. 53-218/89-1 had sued her husband for a tort purportedly committed by him and that such an action was not therefore maintainable by virtue of s. 9(2) of the Married Women Act 1957.

Section II of the relevant policy deals with the question of liability to third parties and cl. 1 in particular reads as follows:

1. The Company will subject to the Limits of Liability indemnify the insured in the event of accident caused by or arising out of the use of the Motor Vehicle against all sums including claimant's costs and expenses which the insured shall become legally liable to pay in respect of:

(a) death of or bodily injury to any person except where such death or injury arises out of and in the course of the employment of such person by the insured and excluding liability to any person being a member of the insured's household who is a passenger in the Motor Vehicle unless such person is being carried by reason of or in pursuance of a contract of employment;

(b) damage to property other than property belonging to the insured or held in trust by or in the custody or control of the insured or any member of the insured's household.

The schedule to the policy ends with the following provision:

SUBJECT TO THE FOLLOWING ENDORSEMENTS AND CLAUSES ATTACHED: 3(P) THIRD PARTY ONLY

(A) JURISDICTION CLAUSE ENDT.

(B) INTOX. LIQUOR/DRUGS EXCLUSIVE CLAUSE

(C) LEARNER-DRIVERS CLAUSE

(D) EXCL. OF PASSENGER LIABILITY.

Under the heading "ENDORSEMENTS", cl. D as reproduced below is relevant:

D. EXCLUSION OF PASSENGER LIABILITY

Notwithstanding anything contained herein to the contrary, it is hereby understood and agreed that the Company shall not be liable in respect of death of or bodily injury to any person (other than a passenger being carried by reason of or in pursuance of a contract of employment) being carried in or upon, or entering or getting on to or alighting from any vehicle in respect of which indemnity is granted under this Policy at the time of the occurrence of the event out of which any claim arises.

As stated earlier, in the trial before the Sessions Court, two issues were raised. The first issue was whether the insurance company in the second suit was liable to satisfy the judgment in the first suit as provided for in para. (a) of cl. 1 of s. II. of the policy. The second was whether the execution of the judgment in the first suit became invalid by virtue of the fact that the wife had sued the husband in tort which was not permitted under sub-s. 2 of s. 9 of the Married Women Act 1957 (hereinafter "the MWA")

It was the learned Sessions Court judge's view that the policy covered the insured and any authorised driver for any injury suffered by a third party travelling in the insured's vehicle subject to two exemptions namely that the insurance company will not be liable for the loss of the insured if the third party was injured in the course of the employment of such person by the insured, or the third party was a member of the insured's household travelling in the said vehicle except if that third party is being carried by reason of or in pursuance of a contract of employment.

The learned Sessions Court judge found from the undisputed facts that the first exemption did not apply to the wife as she was not employed by the insured. She was more inclined to agree with learned counsel for the wife that the second exemption was applicable by virtue of the *contra proferentum* rule, with regard to the term "member of the insured's household", citing *Cornish v. Accident Insurance Co. Ltd.* [1889] 23 QBD 453 where the court said:

> The real difficulty is to express the necessary qualification with which the words must be taken. In a case on the line, in a case of real doubt, the policy ought to be construed most strongly against the insurers; they frame the policy and insert the exceptions. But this principle ought only to be applied for the purpose of removing a doubt, not for the purpose of creating a doubt, or magnifying an ambiguity, when the circumstances of the case raise no real difficulty.

She consequently found that the words "by reason of or in pursuance of a contract of employment" in the second exemption did not mean that the wife must be employed by the insured.

To support her finding, she referred to two cases. One was *Izzard v. Universal Insurance Co Ltd* [1937] AC 773 where a policy of insurance was taken out by the insured in respect of a motor vehicle. The policy, which was headed "Commercial motor policy," incorporated a previous proposal by the insured in which he had given a warranty or undertaking that passenger risk was not to be covered; it provided that the vehicle would be used only for general haulage and other trades, and that the insurance company would indemnify him against liability in respect of death of or bodily injury to any person caused by or arising out of the use of the vehicle provided always that the company shall not be liable, among other things, in respect of death of or bodily injury to any person in the employment of the insured arising out of and in the course of such employment and death of or bodily injury to any person, other than a passenger carried by reason of or in pursuance of a contract of employment, being carried in or upon such vehicle.

It was held by the House of Lords that the language of the last clause, namely liability for death of or bodily injury to any person, other than a passenger carried by reason of or in pursuance of a contract of employment, being carried in or upon the vehicle, was not to be construed as applying only to the death of or injury to a person in the employment of the insured while being carried on the vehicle; that it applied to any person being carried in pursuance of a contract of employment with another employer; and therefore when such a person, while being carried on the vehicle, was killed owing to the negligence of the driver, the insurance company was bound to indemnify the insured in respect of his liability to the representative of the deceased person.

The other authority relied on was the Privy Council decision in *Tan Keng Hong & Anor. v. New India Insurance Co. Ltd.* [1978] 1 MLJ 97. There, the question in issue was whether the insurers were liable to indemnify the appellants, the driver and owner of a lorry, against whom judgment for damages in negligence had been given. The lorry was insured by the insurers under a third party policy which excepted liability for death or bodily injury caused to any person carried on the vehicle, other than to a passenger carried by reason of or in pursuance of a contract of employment. The deceased, a forester in the employment of the Forestry Department, had obtained a free lift on the lorry which overturned on the way to Seremban. It was held in the High Court that the insurers were not liable and in *Tan Keng Hong v. Fatimah binti Abdullah & Ors.* [1974] 1 MLJ 156, the appeal to the Federal Court was dismissed. The appellants had then appealed to the Yang di-Pertuan Agong.

It was held by the Privy Council that the words "by reason of his contract of employment" must be read in conjunction with the words "in pursuance of" and properly construed, mean "because the contract of employment expressly or impliedly requires the employee or gives him the right to travel in the motor vehicle concerned". It does not mean that the passenger was being carried because the driver of the vehicle thought that by reason of the passenger's employment he might gain some business advantage by doing the passenger the favour of giving him a lift. They also ruled that there was no term of the forester's contract of employment, express or implied, which required or entitled him to travel on the second appellant's lorry and therefore the insurers were rightly held not to be liable under the policy.

It must be emphasised by us at this point that we find *Tan Keng Hong's* case is quite distinguishable from the other authorities cited on the facts as the passenger involved was on the vehicle not by reason of or in pursuance of a contract of employment as he was off duty and was merely taking a free ride although the vehicle concerned was involved in a trade related to the passenger's occupation and the authorised driver had given him the ride thinking that he, the authorised driver, might gain some business advantage.

The second issue in the Sessions Court was as regards sub-s. (2) of s. 9 of the MWA which states:

> 9(2) Except for the protection or security of his or her property no husband or wife shall be entitled to sue the other for a tort.

This was actually the provision before the following amendment, which came into force *vide* Act A893/94 on 8 July 1994, was made:

> 9(2) A husband or a wife shall be entitled to sue each other in tort for the protection or security of his or her property, as the case may be.

It must be observed that the Sessions Court proceeded to hear the matter as early as 14 September 1992 but in view of numerous postponements due to the non-filing of written submissions, the decision was only delivered on 29 September 1994.

It was the argument of the insurance company that the judgment in the first suit against the husband in the wife's favour was not valid in view of this provision and we hold that the amendment did not actually alter the position. The learned Sessions Court judge held that the first suit was one of vicarious liability to protect the wife's "property" which is defined in sub-s. (1) of s. 2 of the MWA to include a thing in action. Accordingly, the learned Sessions Court judge found that the judgment in the first suit was valid.

The same two issues were raised in the High Court on appeal. As for the first issue, learned counsel for the wife had maintained that all she need do to prove that the insurance company must satisfy the judgment in the first suit was to show that the injuries sustained by her was the direct result of the negligence of her son as the authorised driver of the insured at the material time.

It was the contention of learned counsel for the insurance company that the wife fell under the category of persons to whom the insurance company under the policy will not have to indemnify for the negligence of the son as the authorised driver of the insured as although family members can travel in the insured's vehicle during the subsistence of the policy, there was no passenger liability cover.

The learned High Court judge referred to para. (a) of cl. 1 of s. II of the policy and reiterated that the insurance company must indemnify the insured in respect of injuries suffered by a third party arising out of the use of the insured's vehicle subject to two exceptions:

(a) the third party was injured in the course of the employment by the insured; or

(b) the third party as a passenger was a member of the insured's household and was at the material time a passenger by reason of or in pursuance of a contract of employment.

The learned High Court judge noted that the said provision is silent as to the authorised driver. This must mean, he added, that the third party need not be employed by the authorised driver. He further opined that since sub-para. (i) of para. (a) of cl. 2 of the policy stated that the insured must include the authorised driver, then the same limitations would apply. What cl. 2 of the policy actually says is that the insurance company will indemnify any

authorised driver provided that he shall, as though he were the insured, observe, fulfil and be subject to the terms of the policy in so far as they can apply and that he is not entitled to indemnity under any other policy.

In *Richards v. Cox* [1943] 1 KB 139, the plaintiff was involved in an accident while being carried as a passenger in her employer's motor van driven by another employee Robson who was an authorised driver of the insured namely Dickerson Brothers. The relevant policy denied liability to persons injured in the course of employment with the insured. However, the court held that the policy still covered the plaintiff in respect of her claim against the authorised driver who was not her employer and the authorised driver, in turn, could claim to be indemnified by the insured against any damages which the plaintiff might recover from him.

In *Lim Eng Yew v. United Oriental Assurance Sdn Bhd* [1989] 1 MLJ 454, the insurance policy issued by the defendant insurance company to the lorry owner indemnified him against all sums which he or any authorised driver might be liable to pay as damages or compensation in respect of death of or bodily injury to any person caused by or arising out of the use of the lorry including costs.

At the time of the accident, the plaintiff was being carried as a passenger in the lorry pursuant to a contract of employment between him and the owner. He sued the insurance company under sub-s. (1) of s. 80 of the Road Traffic Ordinance 1958 as a result of injuries suffered due to the negligence of the authorised driver. He had sued the authorised driver and had obtained judgment for damages. The insurance company disputed liability. The court ruled that the authorised driver would be indemnified by the insurer as though he was the insured although the plaintiff was not employed by the authorised driver.

In coming to his conclusion, the learned trial judge in that case had considered *Richards v. Cox (supra)* and two High Court cases in Singapore on similar facts namely *Chan Kum Fook & Ors v. The Welfare Insurance Co Ltd* [1975] 2 MLJ 184 and *China Insurance Co Ltd v. Teh Lain Lee & Anor* [1977] 2 MLJ 1.

It is necessary to refer to the facts in those two Singapore authorities. In *Chan's* case *(supra)*, two of the company's employees were travelling in the course of employment in the company's motor van driven by another employee Yong when it ran off the road and crashed into a tree owing to Yong's negligence. Together with one of their fathers who was put to loss and expense, they sued the company and Yong. It was held that the insurance company was liable to indemnify Yong in respect of injuries sustained by the two plaintiffs who were passengers carried by reason of or in pursuance of a contract of employment.

In the *China Insurance* case *(supra),* one Cheng Keng, a servant of the insured, was killed as a result of a collision between a vehicle and the insured's motor lorry, which was being driven by Khoo, another servant of the insured on the insured's orders and in the course of his employment. Cheng Keng's legal representatives obtained judgment against Khoo and Khoo's appeal was dismissed. In order to get the judgment sum, they sued the insurance company and succeeded. On appeal, it was held by the Court of Appeal that Khoo's liability was covered by the policy and the legal representatives could recover the payment of his liability through the insurance company.

Based on these findings, the learned High Court judge in this appeal was of the view that the insurance company here was liable to indemnify the authorised driver of the insured.

The learned High Court judge also touched on the exception "being a member of the insured's household". In ascertaining what the parties mean by the words they have used, it was stated in *Watson v. Phipps* [1986] 60 ALJR 1 that the grammatical and ordinary sense of the words is to be adhered to, unless they lead to some absurdity or to some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity or inconsistency, but no further.

Where the words in their ordinary meaning give rise to two distinct interpretations resulting in an ambiguity, the learned High Court judge reiterated that the *contra proferentum* rule would apply citing *Cornish's* case *(supra)* and *English v. Western* [1940] 2 KB 156 where a woman was injured in an accident involving a vehicle driven by her brother and insured by her father. It was contended that since the brother was not the head of the injured's family, as contended in our case, she was not a member of the brother's, in this instance the son's, household. It was held in a majority judgment that:

> A man may be related to a household in two ways. He may be a member of the household or he may be the head of the household ... In other words, in my judgment, either of the two competing meanings of the phrase 'a member of the assured's household is possible and natural, and accordingly, there is in the truest sense an ambiguity in the phrase. There is no doubt that, if the phrase as used in the policy is in this sense ambiguous, the meaning must be chosen which is less favourable to the underwriters who have put forward the policy.

The *contra proferentum* rule has been applied in two local cases involving insurance policies and they are *Malaysian National Insurance Sdn Bhd v. Abdul Aziz bin Mohamad Daud* [1979] 2 MLJ 29 and *Central Lorry Service Co. Sdn. Bhd. v. The American Insurance Co.* [1981] 2 MLJ 40.

In the *Malaysian National Insurance* case *(supra)*, the High Court held that as between the assured and the insurers, the exception clause in the proviso has on the ordinary principles of construction to be read against the insurance company, that is to say, if there were any doubt as to its extent and the question were to arise as to the liability of the insurers, the construction most favourable to the assured must be given to it. The appeal to the Federal Court was dismissed.

Similarly, the High Court in the *Central Lorry Service* case *(supra)* ruled that, in construing insurance policies, the *contra proferentum* rule should apply if there was ambiguity or doubt as to the extent of the policy. Since the policy was prepared by the insurance company, the ambiguity and doubt should be construed in favour of the insured.

Accordingly, the learned High Court judge in this appeal held that the wife is not a member of the son's household but she is entitled to have the judgment in her favour satisfied by virtue of the son being the authorised driver of the insured. We, however, are more inclined to state that there is actually no ambiguity or doubt as the wife is actually a member of the insured's household.

The learned High Court judge further opined that the wife was in the husband's motor car "by reason of" her contract of employment with Tharmarajoo. He stressed that if the insurance company intended to exclude that situation, it must be expressly stated in the policy.

It may be appropriate to recapitulate on the facts of *Izzard's* case *(supra)* at this point:

> By a verbal contract made in April, 1934, between the builders and one Izzard, a carpenter, who lived at Didcot, it was provided that he should work for them at Coventry on the terms that he should get a certain rate of pay and that a lorry should be at his disposal for going home at week-ends.
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> On July 21, 1934, Izzard was being carried home on the insured's vehicle by the insured's servant when it overturned, with the consequence that Izzard sustained such injuries that he died on the following day. In respect of this Izzard's widow – the present appellant – brought an action against the insured under Lord Campbell's Act and recovered judgment for 8501., but as the insured was thereafter adjudicated bankrupt his rights against the company were transferred to and vested in the appellant by virtue of the Third Parties (Rights against Insurers) Act, 1930, and thereupon she claimed the amount from the company.
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> By an agreement between the company and the appellant her rights under the policy were referred to an arbitrator, who found in favour of the appellant and his decision was affirmed by MacKinnon J. but that judgment was reversed

by the Court of Appeal (Greer L.J. dissenting), Slesser and Scott LJJ taking the view that the expression "contract of employment" in clause (c) above set out was limited to a contract of employment between a passenger, whose death or injury was caused by the use of the vehicle, and the insured, and that inasmuch as the policy purported to eliminate passenger risk, the company was not liable to indemnify the insured against liability for the death of a passenger carried in the vehicle by reason of or in pursuance of a contract of employment with some person other than the insured.

The widow appealed to this House.

Learned counsel for the respondent submitted that:

As regards the relationship between Izzard and the insured, and he was in no relationship at all material to any question in the case except to and with his employers, the building company. By the proposal it was stated that passenger risk was not to be covered, and on that account a smaller premium was paid. Neither the company not the insured contemplated insurance of passengers except those who were carried by reason of their contract of employment with the insured. The other words were intended to cover servants of the insured who by reason of their remuneration were excluded from the benefit of the Workmen's Compensation Act. The insured was required to get cover for risks affecting persons in his employment and no others.

For this purpose, it is relevant to quote from the well reasoned judgment of the House of Lords through Lord Wright in that case when it when up on appeal where at p. 778 he said:

The arbitrator in these circumstances found that Izzard was being carried as a passenger on the vehicle by reason of and in pursuance of a contract of employment, that his death was caused by and arose out of the use of the vehicle, and that at the time the death was caused the commercial motor vehicle was being used for a purpose mentioned in the schedule to the policy – that is to say, general haulage and other trades.

Then at p. 779 he continued:

This indemnity is subject to certain exceptions or provisos, of which it is here necessary to particularise two: "(b) Death of or bodily injury to any person in the employment of the insured arising out of and in the course of such employment; (c) death of or bodily injury to any person (other than a passenger carried by reason of or in pursuance of a contract of employment) being carried in or upon or entering or getting on to or alighting from such vehicle at the time of the occurrence of the event out of which any claim arises.

It is clear that though passenger risk in the full sense of the term is excluded, a certain limited class of passenger risk is specifically covered – namely, that described in the words in brackets in (c) quoted above which is in the form

of an exception to an exception, and thus constitutes a positive cover. The crucial question is whether these words cover the particular liability which is claimed to exist in this case.

At pp. 780 and 781, he remarked as follows:

The substantial objection which was raised on behalf of the respondents, and which found favour with the majority of the Court of Appeal though rejected by the arbitrator, MacKinnon J and Greer LJ, was that the bracketted words in (c) must be limited by reading "by reason of and in pursuance of a contract of employment" as meaning "a contract of employment with the Insured." The contract of employment which the arbitrator found was a contract not between Izzard and Druce, the insured, but between Izzard and Industrial Builders, Ltd, for whom he was working under a contract which included as one of its terms the option of being conveyed between his home at Didcot and the work at Coventry at week-ends. If correctly construed the policy did not, it was said, cover the risk, because the only contract of employment that could have been relevant was one between Izzard and Druce.

The essence of the judgment is captured by the following excerpt at pp. 782 and 783:

I cannot accept the respondents' contention that "contract of employment" should be construed in the Act as subject to the implied limitation "with the person insured by the policy." Such a departure from the clear language used cannot, I think, be justified. I think the Act is dealing with persons who are on the insured vehicle for sufficient practical or business reasons, and has taken a contract of employment in pursuance of which they are on the vehicle as the adequate criterion of such reasons. But there is no sufficient ground for holding that this criterion should be limited to employees of the insured person. Such employees, if injured or killed, would ordinarily fall under exception (I.), though I am not prepared to say that there might not be in certain events an employee of the assured who could claim as a passenger. But such cases must be rare. The most probable case is where the man killed or injured was on the vehicle in pursuance of a contract not with the owner of the vehicle but with someone else, for instance, with the person whose goods were being carried on the vehicle: thus a commercial vehicle carrying a contractor's or merchant's goods would frequently and perhaps even normally have on it an employee of the goods owner to see to loading or unloading or delivering the goods or caring for them in transit. For these purposes such a man may be carried as a passenger.

The insured person may come under third party liability to such a man who may be described as being in the position of an invitee in the legal sense, *vis-a-vis* the insured person. A further illustration which comes under the same category is that an employee or employees of the owner of the goods which are being carried, who go out on the lorry with the goods and return home in the lorry after the goods are delivered. Such employees may properly be

> regarded as passengers carried in pursuance of a contract with some one other than the insured person. A further illustration is afforded by the facts like those of the present case. Izzard and his mates were being carried, so the arbitrator has found, for purposes of the trade in which the truck was engaged and as an incident of the haulage so far as Druce was concerned. The arbitrator has found that the vehicle was being used for haulage purposes and I see no reason in law for doubting this finding. Similar instances could be multiplied.
>
> I see every practical reason for construing the phrase in the Act "contract of employment" as including a contract with a third party. This does not exclude a contract with the insured person. The words used are apt to include both cases. As a matter of words I think the plain meaning is the true meaning. The words of the statute are general and unlimited. To insert the words "with the insured person" would be to insert words of specific limitation beyond what can be inferred from the general tenor of the Act or policy. If these words had been intended they could and should have been expressed, as was done in the previous paragraph (I.). They are not expressed and in my opinion ought not to be and cannot properly be implied.

With the word "or' in the words "by reason of or in pursuance of a contract of employment" means, to the learned High Court judge, that it should be read disjunctively. To read it conjunctively, he emphasised, would be doing violence to the word "or". He concluded that in reading disjunctively, the wife could obtain satisfaction as regards the judgment in the first suit against the insurance company by reason of her contract of employment with Tharmarajoo.

To fortify his reasoning, he stated at p. 37 of his judgment as follows:

> The *Pocket Oxford Dictionary* defines the word "or" as "introducing alternatives." The *Britannica World Language Dictionary* defines 'or' as "the alternative expressed by or is emphasised by prefixing to the first member, or adding after the last." Put in another way, when there are several possibilities 'or' is placed before the last one. This means that when the word 'or' is used there is a choice to be made, between one or the other and not to accept both of them. Thus, the word 'or' appearing in the bracketed words of clause 9 endorsement D reflects the intention of the insurance company to construe the word 'or' as disjunctive and not conjunctive.

To conclude, he had this to say:

> By virtue of the terms of the policy, I hold and it is my judgment that the wife can enforce that policy against either the policy holder (the husband) or the authorised driver (the son) and the paymaster, at the end of the day, would be the insurance company. An unreasonably strict construction should not be adopted in construing the policy as it will result in manifest injustice to the husband. Insurance companies should not offer, with impunity, seemingly *vide* coverages to their customers but only to deny liability on tenuous grounds when

a claim is actually made. This should not be the case and this Court will not countenance it. I would, for the reasons adumbrated above, answer the first issue in favour of the wife.

Pertaining to the second issue, the learned High Court judge remarked that sub-s. (2) of s. 9 of the MWA only prevented actions in tort against a spouse. But, he added, the first suit was against the son for the tort of negligence and the husband was roped in only to establish the vicarious liability aspect. As the husband is not the tortfeasor, it was his finding that the MWA is not applicable.

Learned counsel for the insurance company had argued that for the wife to succeed, there should have been passenger liability cover taken by the husband. To this, the learned High Court judge said at pp. 44 and 45 of his judgment:

> Here, there was no necessity for the husband to take a passenger liability cover, as I held in the early part of this judgment, because the policy is sufficiently worded to protect the wife and to enable the wife to obtain satisfaction against the insurance company. Section 9(2) of the Married Women Ordinance, 1957 speaks of a tort committed by the husband, whereas on the facts of the present appeal no tort was committed by the husband. Simple logic and pure common sense would exclude the operation of section 9(2) of the Married Women Ordinance, 1957 from the present appeal and I so hold accordingly.
>
> By way of an alternative, in the event I am wrong in my interpretation of section 9(2) of the Married Women Ordinance, 1957 in that the action against the husband was in fact in the nature of an action in tort and, consequently, barred, yet the action by the wife can be construed to be an action to protect her property which by virtue of section 9(1) of the Married Women Ordinance, 1957 would be permissible. Section 2 of the Married Women Ordinance, 1957 defines "property" to include a thing in action and by section 9(1) of the same Ordinance it is enacted that:
>
> 9(1) Every married woman shall have in her own name against her husband, the same remedies and redress for the protection and security of her property as if such property belonged to her as a *feme sole.*

Learned counsel for the insurance company reminded us during the course of this appeal that the wife was on her way to work on transport not provided by her employer or under any arrangement express or implied by her employer or under any practice sanctioned by her employer.

It may be opportune at this point to look at other cases pertaining to this issue. In *Vandyke v. Fender and Another Sun Insurance Office Ltd. (Third Party)* [1970] 2 QB 292 the facts were these. Vandyke and Fender were skilled moulders who agreed to work for a foundry thirty miles away from their

homes as their employers had made an arrangement with them to provide a car with petrol. Fender was to pick Vandyke and other employees and Fender would drive one way and Vandyke the other.

On one occasion when Fender was driving and Vandyke was a passenger in a car which unknown to both of them did not belong to the employers, Vandyke was seriously injured through Fender's negligent driving. Vandyke sued Fender and their employers for damages and the employers joined the insurers as the third party. Fender and the car owner had insurance policies with passenger cover but Fender's insurers were in liquidation and the car owner's policy did not cover the use of the car by Fender when driving in connection with business.

The trial court was of the view that Vandyke was injured in the course of his employment and the third party insurers must indemnify the employers under the policy in respect of the judgment given against Fender and the employers. In allowing the subsequent appeal by the insurers, the Court of Appeal said that the employers were liable for Fender's negligence for he was driving the car for their purposes whether or not he was in the course of his employment.

It was also held that the phrase "arising out of and in the course of his employment" in the Road Traffic Acts and also in employers' liability policies must be interpreted as it had been interpreted for over fifty years at common law in decisions under the Workmen's Compensation Acts 1897 to 1945. Those decisions established conclusively that when a workman was injured while travelling to or from work in a form of transport provided by his employers on a public road or outside the work premises he was not "in the course of his employment" unless his terms of employment obliged him to travel in that way; and that as the plaintiff was not obliged to travel in the car provided, the injury sustained by him did nor arise out of and in the course of his employment within the terms of the policy and the third party insurers were not therefore liable to indemnify the employers.

In *Nottingham v. Aldridge and another (The Prudential Assurance Co Ltd., third party)* [1971] 2 All ER 751, the plaintiff and the first defendant were apprentices employed by the second defendant. As part of their contracts of service with the second defendant, the plaintiff and the first defendant were attending a residential training school at Bletchley. On the Thursday, they had gone to Oxford, where they lived, to attend a local educational class on the following day. Attendance at the class was part of the duties owed under their contracts of service. After attendance at the class they spent the weekend at their homes. On Sunday night they were returning to the residential training school at Bletchley in a van driven by the first defendant and owned by his

father. The plaintiff was a passenger in the van. On the way, an accident occurred in which the plaintiff was injured. The first defendant had agreed to take the plaintiff back to Bletchley not as a friendly act but in the knowledge that he was entitled to claim from the second defendant a mileage allowance for the journey, an additional passenger allowance for the plaintiff and a further allowance in respect of the journey. At the time of the accident, the plaintiff and the first defendant were driving to their place of work, that is, the Bletchley training school, the plaintiff being required to be back there by midnight on Sunday and the first defendant by Monday morning. The plaintiff brought an action for damages in respect of his injuries against the first and second defendants in which the first defendant admitted negligence. The first defendant brought third party proceedings against the insurers, who had issued a comprehensive commercial vehicle policy in respect of the van, claiming indemnity under the policy in respect of his liability to the plaintiff. The policy permitted the carriage of passengers but excluded liability for "injury to any person other than a passenger carried by reason of or in pursuance of a contract of employment". The questions arose whether the second defendant were vicariously liable for the first defendant's negligence and, in the third party proceedings, whether the policy covered the first defendant's liability to the plaintiff.

It was held that:

(i) The second defendants were not vicariously liable for the negligent driving of the first defendant for the following reasons -

(a) although the relationship of master and servant existed between the defendants, the first defendant was not at the relevant time acting as the second defendant's servant since the journey was not in the course of his employment; he was under no obligation by the terms of his employment to drive the van or to carry the plaintiff; his only obligation was to present himself for duty on Monday morning, the mode and time of travel and the route he took being at his discretion; the fact that he received a passenger allowance from his employer did not make him 'a paid driver'...;

(b) neither was the first defendant driving the van as the agent of the second defendant; although ownership of the vehicle by the principal was not, as a matter of law, necessary to impose liability on the principal for the acts of a driver of the vehicle who was not his servant, it was necessary that the driver should have been driving in a genuine representative capacity, that is, as an agent for and on behalf of the principal as one to whom there had been delegated a task or duty, and ownership of the vehicle, although not decisive, was a powerful factor in determining representative capacity; on the facts of the present case the second defendant were not so involved in the carriage of the plaintiff as to make

the first defendant their agent at all; the first defendant was not driving in a representative capacity for the second defendant were content that their employees should return to Bletchley in any way they liked; the first defendant was not engaged to carry the plaintiff and owed no obligation to the second defendants to do so ...;

(ii) The liability of the first defendant to the plaintiff was covered by the terms of the policy for, approaching the question on the basis that the contract of employment referred to in the policy was that of the passenger, the test was whether the contract of employment had some relevance to the undertaking of the carriage; for the purpose of construing the policy there was no difference between the case where payment was made to the carrier for carrying an employee to work under a pre-existing contract of carriage and the case where the carrier, while under no obligation or contract with the employer to carry, knew that he could look to the employer for payment if in fact he did carry an employee; in the present case the employers had agreed with their employees to finance their carriage and it was for this reason that the first defendant was carrying the plaintiff; accordingly the plaintiff was being carried by reason of his contract of employment ...

In the earlier case of *Smith v. Moss and Another* [1940] 1 All ER Annotated 469, Mrs. Rosalie Smith was the owner of a car but was unable to drive it. Her son drove it for her, as the judge found, as her agent. The car was garaged at the son's house. On 1 January 1938, the son drove his mother and his wife home from a party and, having set his mother down at her house, was driving the car to the garage at his own house, his wife being a passenger in the car. On the way, an accident occurred by reason of the son's negligence, and the wife was injured. The wife sued the mother for damages for personal injuries, and it was pleaded in defence that the wife could not recover in respect of her husband's negligence. It was held that at the time of the accident, the husband was acting as the agent of his mother, and the wife was entitled to recover.

The Supreme Court in *United Oriental Assurance Sdn. Bhd. v. Lim Eng Yew* [1991] 3 CLJ 2418; [1991] 3 MLJ 429 decided on the following facts. The plaintiff was an employee of one Lim Yoke Pak. The plaintiff sustained severe personal injuries when the lorry in which he was travelling met with an accident. At the time of the accident, the plaintiff was being carried as a passenger in the said lorry pursuant to a contract of employment between him and the owner of the lorry, who was also his employer. The lorry was covered by an insurance policy with third party risks issued by the defendant. The plaintiff obtained judgment against the driver of the lorry for damages, interest and costs and demanded payment of the judgment sum from the defendant who denied liability. Judgment was given for the plaintiff in the High Court and the defendant appealed.

In dismissing the appeal, it was held that the plaintiff was working as a salesman for the registered owner of the said lorry and was required by his contract of employment to travel on the said lorry. In the circumstances, the learned trial judge was right in deciding that, upon a proper construction of the policy of insurance and ss. 75(1) and 80(1) of the Road Traffic Ordinance 1958, the defendant was liable to pay the plaintiff the amount due under the judgment.

In *Baker v. Provident Accident and White Cross Insurance Co., Ltd.* [1939] 2 All ER Annotated 690 the plaintiff was employed at the Croft Laundry, which was situated in a somewhat isolated spot about a mile from the main Manchester to Bury road, making it necessary for the owners of the laundry to grant their employees certain transport facilities for getting to and from their employment. This the owners did by the use of their own vans. Along the main Manchester to Bury road was a regular service of buses, which passed Blackford Bridge, near the point at which the road to the laundry left the main road. The plaintiff, while riding away from work in a laundry van driven by one Cordery, a laundry employee, was injured as the result of a collision between the van and another vehicle at a point beyond Blackford Bridge on the way to Bury, and she subsequently obtained a judgment for damages against Cordery and Graham, the driver of the other vehicle. The judgment was satisfied in part by Graham and the plaintiff then brought an action against the defendant company as the laundry owners' insurers against third party risks in respect of the van. The policy, in accordance with s. 36(1)(b)(ii) of the Road Traffic Act 1930, covered passengers carried in the van by reason of or in pursuance of a contract of employment. It was found as a fact that the owners of the laundry had given permission to their employees to travel on their vans to Blackford Bridge, but no further. It was held that beyond Blackford Bridge the plaintiff was not riding in the van as a passenger with the permission or authority of the employers. The carriage of the plaintiff beyond this point was not therefore a carriage by reason of or in pursuance of her contract of employment, and the defendant company incurred no liability under the policy in respect thereof.

At pp. 695 and 696 of that judgment it was stated:

> Then comes the provision which has given rise to so much discussion, because it seems to be worded in such a way that it constitutes an exception upon an exception. It says:
>
> ... (ii) except in the case of a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment ...
>
> Then it sets out the liability which a policy shall not be required to give. As I look at that exception, it means that, if a person is being carried upon a vehicle by reason of or in pursuance of a contract of employment, the policy

> is required to cover that person, and this policy, being in accordance with the law, does cover that person, provided, of course, that the person is being carried by reason of or in pursuance of a contract of employment. In so far as there is a difference – and there undoubtedly is – between the phrase "in pursuance of a contract of employment" and the phrase "by reason of the contract employment" I think its effect is this. A person is being carried in pursuance of a contract of employment, if it is a term of the contract of employment that he or she shall be carried. That is the meaning which I would attach to the phrase "in pursuance of a contract of employment." In so far as the person may be affected by reason of a contract of employment, I would say, with reference to a case where an employer says to an employee, "Go on that vehicle," or "Be carried upon that vehicle," and he is only able to give that order by reason of the fact that there is the relationship of employer and employee between them, that, by reason of a contract of employment, it would certainly cover such an instance or example as arose in *Izzard v. Universal Insurance Co., Ltd.*

Pertaining to the first issue, the common feature in all the passenger liability cases is that the insurers have been held to be liable. Although the passenger is not insured, either the authorised driver, the vehicle owner or the employer would have to be indemnified by the insurer. It did not really matter whether the passenger was in the employment of any of these three categories although in most of the authorities, the passenger was employed by the vehicle owner. *Tan Keng Hong's* case *(supra)* need to be distinguished as there the passenger was taking a free ride and was not in the vehicle by reason of or in pursuance of a contract of employment. In *Vandyke's* case *(supra)*, both Fender and Vandyke were not aware that the car did not belong to their employers despite the transport arrangements made earlier and the car owner's policy did not cover the use of the car by Fender when driving in connection with business. The difference in *Baker's* case *(supra)* was that the accident happened beyond the point of the route covered by the relevant policy.

After dutifully deliberating on the arguments and authorities and for the reasons stated earlier, we can find no justification to differ with the conclusion reached by the learned trial judge and the appeal judge in the court below on both the issues. As for the first issue, we hold that the wife was entitled to recover from the insurance company as she was travelling in the car belonging to her husband, who is the insured, and driven by her son, who was an authorised driver, under the relevant policy by reason of or in pursuance of a contract of employment not with the insured. As for the second issue, we find that the wife had sued the husband not in tort but only as regards the vicarious liability for the action in tort against her son.

Accordingly, we dismiss the appeal with costs and order that the deposit is to go to the respondent to account of the taxed costs.

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